

## MEMORANDUM OF LAW

DATE: September 12, 1994

TO: Lawrence B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Assignment of Retirement Contributions as Collateral for Loans

You have asked whether members can assign their retirement contributions to a lending institution as collateral for loans.

At present, there are no legal impediments to assignments of retirement contributions as loan collateral. There are, however, strong public policy considerations and an industry practice which suggest that these assignments should be prohibited.

A brief background of this issue and our analysis follow.

### BACKGROUND

Historically, San Diego Municipal Code ("SDMC") section 24.0520 prohibited assignments of member contributions unless the assignment was used to secure a loan for medical purposes. In practice, however, the Retirement System allowed members to assign their retirement contributions to the San Diego Municipal Credit Union ("SDMCU") as collateral for loans for any purpose. This was a longstanding practice. (See, attached Memorandum of Law dated April 28, 1958, which states that assignments are valid and binding.) Minutes from the Retirement Board meeting on October 18, 1962, reveal that the Retirement Office routinely processed assignments. Apparently, in recognition of this practice, SDMC section 24.0520 was repealed on October 25, 1962.

The Retirement Office processed assignments in the following manner. If the member terminated employment with an outstanding SDMCU loan balance, the office would pay the remaining balance of the loan to SDMCU from the contributions to be refunded to the member. The remaining contributions would then be given to the member. This practice created many problems. Some members complained about their contributions being paid directly to the SDMCU. The Retirement Office was also placed in the awkward position of determining who to pay first when more than one assignment had been made. Honoring assignments made to lending institutions other than the SDMCU also became an issue of concern for the office.

This practice was discontinued in light of a Memorandum of Law from

this office dated April 16, 1985, which concluded that assignments are prohibited since they are not expressly authorized by the SDMC. Upon thoroughly researching the issue, and for the reasons stated below, we arrive at a different legal conclusion and expressly overrule that portion of the 1985 opinion that prohibited assignments of retirement contributions on legal grounds.

As a matter of policy, however, and in recognition of the industry practice prohibiting these assignments, the Board may wish to refer this matter to the City Council for the adoption of a SDMC provision which prohibits assignments. A proposed SDMC provision is attached for your review.

### DISCUSSION

#### PENSION RIGHTS ARE ASSIGNABLE UNLESS SPECIFICALLY PROHIBITED BY MUNICIPAL LAW

An "assignment" in law is the transfer of property, or some right or interest in property, from one person to another. Generally, contractual rights are assignable unless specifically prohibited or restricted by statute. 7 Cal. Jur. 3d Assignments, Section 3 (Rev. 1989). A pension plan offered by an employer, and impliedly accepted by an employee by remaining in employment, constitutes a contract between them. 49 Cal. Jur. 3d Pensions & Retirement, Section 1 (1979). Accordingly, pension rights of municipal employees, like any other contract rights, are generally assignable unless specifically prohibited or restricted by municipal law.

The San Diego City Charter ("Charter") and the relevant SDMC sections provide the statutory guidance for the operation of the retirement system. Presently, both the Charter and the SDMC are silent with regard to assignments of retirement contributions. The only SDMC provision referring to assignments of retirement contributions was former SDMC section 24.0520F

SDMC section 24.0520 stated in pertinent part,

The right of a person to a pension or annuity or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit, . . . shall not be subject to execution, garnishment, attachment or any other process whatsoever, and shall be unassignable except as in this Ordinance specifically provided. Members of the retirement system may, however, assign a right to such funds as are deposited in the retirement fund b such employees as security for the repayment of a loan made to such members by a legally organized municipal credit union, when such loan secured for the purpose of paying the cost of medical services, operations, hospital services, sickness, dentistry, medicine, drugs, burial expenses, and such other incidental expenses as arise out of or because of accidents and ill health, provided that such assignment is accompanied by evidence of the need for money for the purposes hereina

outlined.

This section prohibited assignments of retirement contributions, unless to secure a loan for medical purposes. This section was repealed on October 25, 1962. Although the record does not state the reason for the repeal, it appears that the City Council intended to amend the SDMC to conform to the ongoing practice of honoring assignments of retirement contributions as collateral for any type of loan.

Since there is currently no provision which restricts or prohibits assignments, members have the right to assign retirement contributions as collateral for loans. However, the assignment must be subject to a member's discontinuance of City service because a member is not entitled to withdraw his or her contributions until such time. (See, attached Memorandum of Law dated April 28, 1958.) The SDMC no longer limits assignments to a municipal credit union. Therefore, this right of assignment would extend to anyone the member chooses.

#### ASSIGNMENTS PROHIBITED IN OTHER RETIREMENT SYSTEMS

As stated in our Memorandum of Law dated April 16, 1985, pensions of municipal employees are frequently made unassignable. (See, *City of San Jose v. Forsythe*, 261 Cal. App. 2d 114 (1968).) Nonassignability clauses with respect to retirement benefits, which include the return of contributions, are prevalent under public and private retirement systems. For example, the following retirement systems, which represent the vast majority of public pension plans in this state, prohibit assignments of retirement contributions:

- State Teachers' Retirement System (Education Code Section 22006);
- Legislators' Retirement Law (Govt. Code Section 9359.3);
- Public Employees' Retirement System (Govt. Code Section 21201);
- County Employees' Retirement Law (Govt. Code Section 31452);
- County Peace Officers' Retirement Law (Govt. Code Section 31913);
- County Fire Service Retirement Law (Govt. Code Section 32210).

In addition, private pension plans, including those governed by both the Internal Revenue Code and ERISA, prohibit the assignment of plan benefits, with some exceptions. 60 Am. Jur. 2d, Pension & Retirement Funds, Section 456. Our own Supplemental Pension Savings Plan ("SPSP") and 401(k) Plan prohibit assignment of contributions for the protection of the plan members.

California law favors the enforceability of clauses which protect retirement benefits from the claims of creditors. *Thomas v. Thomas*, 192 Cal. App. 2d 771, 780 (1961). Public policy favors preserving retirement contributions for the economic security of the retired or disabled worker. If the funds can be assigned as collateral for loans, members facing economic hardship may quickly deplete these funds.

The administration of retirement plans may also become more cumbersome in light of assignments. If assignments are allowed, the

Retirement Office is placed in the difficult position of having to deal with persons other than the member or the member's beneficiaries. The office has to determine who is entitled to what funds and in what order. See generally, Thomas, 192 Cal. App. 2d at 781. These two factors apparently led to the conclusion reached in our Memorandum of Law dated April 16, 1985. While these are valid considerations, the law as it stands allows assignments of retirement contributions.

In light of these policy considerations, as well as the prevailing practice in most public and private retirement systems, the Board may wish to refer this matter to the City Council for further action. A proposed amendment to the SDMC which prohibits assignments is attached for your review. The amendment is the same as previously repealed SDMC section 24.0520 with two exceptions. First, the right to assign retirement contributions as collateral for loans to secure medical services has been deleted. Second, pension rights have been made subject to court process for child, family and support orders as permitted by Code of Civil Procedure section 704.110. These two changes bring this amendment in conformity with other public pension plans in this State. Until this amendment is adopted by the City Council, retirement contributions are assignable as collateral for loans.

#### CONCLUSION

After a thorough review of previous memoranda of law, the Charter, SDMC, and other relevant authority, we conclude that members may assign their retirement contributions to any lending institution as collateral for loans, as long as the assignment is subject to the member's discontinuance of City service. If the Retirement Board, as a matter of policy, would like to restrict or prohibit the assignment of retirement contributions as collateral for loans, then the proposed amendment to the SDMC needs to be adopted by the City Council. Until such adoption, members have the right to assign their retirement contributions.

If you have any further questions, please feel free to give me a call.

JOHN W. WITT, City Attorney

By

Jennifer K. Hooper

Deputy City Attorney

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Attachments

ML-94-75